



IN THE HIGH COURT OF MALAWI

MZUZU REGISTRY

CONFIRMATION CASE NO. 722 OF 2018

Being Criminal Case No. 716 of 2018 in the SRM's Court Sitting at Mzuzu

REPUBLIC

VERSUS

EMMANUEL MSUKWA

CORAM: HON. JUSTICE T.R. LIGOWE

W. Nkosi, of Counsel for the State

C. K. Phiri, of Counsel for the Respondent

G. Msukwa, Official Interpreter

J.N. Chirwa, Court Reporter

JUDGMENT

Ligowe J

- 1 Emmanuel Msukwa was convicted of two offences in the Senior Resident Magistrates' Court at Mzuzu. The first is child abduction contrary to s. 78 (1) of the Child Care Protection and Justice Act and he was sentenced to imprisonment for five years with hard labour. The second is defilement contrary to s. 138 (1) of the Penal Code and he was sentenced to imprisonment for 16 years with hard labour.
- 2 Upon review, the reviewing Judge set the matter down for hearing to consider the propriety of the conviction.

- 3 The facts are that the girl (GM) was actually withdrawn from an early marriage. Blessings Ngwira, a Child Protection Officer at the Social Welfare Office in Mzuzu was called to the Victim Support Office on 7th August 2018 to meet GM. GM told him that Emmanuel Msukwa picked her from her house but she was not aware of where to. Chimwemwe Phiri and another person encouraged her to go with Emmanuel Msukwa after they received money from him. Afterwards Emmanuel Msukwa had sexual intercourse with her. Upon hearing this Blessings Ngwira took GM to the One Stop Centre at Mzuzu Central Hospital for examination. The examination results indicated that the girl had had sexual intercourse and was three months pregnant.
- 4 GM was 13 years old at the time and the court had to conduct a *voir dire* in accordance with s. 6 (1) of the Oaths, Affirmations and Declarations Act before receiving her evidence. Finding that she does not understand the nature of either an oath or an affirmation, the court allowed her to give unsworn evidence. She was living with her Uncle Kennison Kanyenda at Lusangazi, Mbowe in the outskirts of Mzuzu City. She was in standard four at school. Her own explanation was that she got married to Emmanuel Msukwa in August 2018 and were living together at Geisha. On 5th August 2018 in the evening, when her Aunt, Chimwemwe Phiri, came to her house to have GM do her hair, she told her to meet a friend who wanted to see her at the road. When she went, she found the friend together with Emmanuel Msukwa. She was told to marry him as they had already received lobola. She refused at first, but they insisted and she accepted. The same day they left for Geisha. It was when they decided to go to town together that they were arrested by the Police because she was much younger than Emmanuel Msukwa. She started sleeping with Emmanuel Msukwa before they got married and had sex twice after marriage.
- 5 Chimwemwe Phiri is 18 years old and a niece to Emmanuel Msukwa but she is probably called Aunt because she is older than GM. Otherwise, it appears there is no familial relationship between her and GM. Her evidence was that on a Wednesday afternoon in July 2018, GM told her that she wanted to get married to Emmanuel Msukwa. Chimwemwe's observation was that Emmanuel was not GM's age but GM said she was pregnant and her

grandparents would probably chase her to get married to him. She did not force her to get married to him nor did she receive any money from him.

6 As earlier said, Kennison Kanyenda was the one living with the girl at Lusangazi. His evidence was that he came home from work around 7:00 pm on 5th August 2018. Afterwards, came Chimwemwe Phiri to have her hair done by GM. When she left, he checked and found that GM was also not around. When he went to work the following day, GM was still not around. Two days later he was told GM had been arrested together with Emmanuel Msukwa.

7 In the Senior Resident Magistrate's Court, Emmanuel Msukwa was first charged with defilement. After every witness testified, the State amended the charge to include child abduction. Emmanuel Msukwa pleaded guilty to the offence of child abduction and maintained a plea of not guilty to defilement. He admitted having had sexual intercourse with GM but his defence was that she told him she was 18 years old and he believed because she told him he was not there where she was born and that she had been married before.

8 The proviso to section 138 of the Penal Code states that it shall be a sufficient defence to any charge under it if it shall be made to appear to the court, jury or assessors before whom the charge shall be brought that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age of sixteen years.

9 In view of this provision the trial Magistrate applied the High Court decision in *Yona Kamowa v. Rep*, Criminal Appeal No. 12 of 2016 (Principal Registry) (unreported), [2017 MWHC 26 (06 January 2017) where Kamwambe J stated:-

"It is imperative for the prosecution to prove that there was penetration, and that the girl was under the age of sixteen years. It appears that it is irrelevant whether the offender knew of the age of the girl or not. When you go out with any girl you take a risk that the girl will turn out to be sixteen. This is a departure from the case of *Maloza Manda -v- The State* Criminal Appeal Case No. 21 of 2010 Mzuzu

District Registry which says that the prosecution has also to prove that the accused person had knowledge or ought to have known that the girl was under sixteen. Whether one knew or failed to make an effort to know the age of the girl is not an important ingredient of the offence. However, under the proviso, a defence is created if circumstances are shown by the offender to the satisfaction of the court that the offender had reasonable cause to believe and did believe that the girl was above the age of sixteen. This will only arise after the prosecution has laid down its case or the two important ingredients of the offence stated above."

10 Kamwambe J further stated: -

"The question is how is the statutory defence applied? The operative words are, '*if it shall be made to appear to the court ...that the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above the age sixteen years,*' (my emphasis). This means that the court must be satisfied that the offender has provided in the mind of the court good reason to believe that the girl was above sixteen years old."

11 In the appeal that was before him, Kamwambe J found that the accused failed to convince the court that he had reasonable belief that the girl was safely above 16 years quoting the judgment of the lower court where it said: -

"The accused testified that when he proposed love to PW 1, she told him that she was 16 years old while PW 1 testified that she told him that she was 14 years old. This court had the occasion of seeing PW 1 in court as she was giving her evidence. Any reasonable person seeing her would conclude that she is not over sixteen years. She looks so young that she can be mistaken for a 13-year-old yet she is pregnant now. May be as the pregnancy progresses, she will look older. This court finds that the accused must have or ought to have known that PW 1 is a child under the age of 16 years and should not have had sex with her."

12 And Kamwambe J stated: -

“When a girl looks 10 years old and she tells you that she is 17 years old, you are expected to assess the situation and convince yourself and any reasonable person including the court that it would think likewise, that the girl is 17, otherwise, you are taking a risk of the girl turning out to be 10 as she looks.”

13 Counsel for Emmanuel Msukwa in this case contends that in its judgment the lower court does not shade light on the appearance of the girl and that it overlooked the fact that she informed him that she had been married before. Counsel also contends that the involvement of Aunt Chimwemwe Phiri connotes approval of the family for the girl to marry and that presupposes she was of age. Counsel proposes that the court should have taken the approach in *Yamikani Paul v. Rep*, Criminal Appeal No. 16 of 2017 [2017] MWHC 87 (07 June 2017) considering that Emmanuel Msukwa was not represented.

14 Well. The girl was 13 years old at the time she testified and the court conducted a *voir dire* in accordance with s. 6 (1) of the Oaths, Affirmations and Declarations Act which requires the court to form an opinion whether a person of immature age understands the nature of either an oath or an affirmation before receiving his or her evidence. Finding that the girl did not appreciate, the court allowed her to give unsworn evidence. This alone indicates that the girl was under age and there is no way, while Emmanuel Msukwa believed she was 18 that the lower court would find there was reasonable cause to so believe. In fact, the Senior Resident Magistrate said: -

“From the analysis of the evidence, I am not satisfied that the accused has provided in the mind of the court good reason to believe that GM was above sixteen years old. Basically, the first limb of what the accused is saying is that he believed her that she was eighteen years old because that is what she told him. In my view, that could not be a good reason, enough for the accused person to have reasonable belief and to in fact believe that the girl was of or above age of sixteen. The second limb of the claimed belief by the accused that the girl was indeed eighteen years is that she told him that she was pregnant and that she had married before. Again, whether she was pregnant or not, on its own could not be enough reason for the accused to

have reasonable cause to believe and to so in fact believe that GM was of or above the age of sixteen years.”

15 It is clear from Emmanuel Msukwa’s evidence in defence that he did not rely on the girl’s appearance for his belief that she was 18 years old. Chimwemwe Phiri is herself a young person and not a family member of GM, although referred to as Aunt. She in fact is related to Emmanuel Msukwa. Her own evidence is that she did not receive any money for calling GM to meet Emmanuel Msukwa. She could not have received *lobola* and her involvement cannot signify approval of GM’s family for her to get married and that she was of age. My assessment is that Emmanuel Msukwa was properly convicted of both offences charged.

16 I have also carefully considered the sentences. The principle to apply is that the discretion of the trial court should not be interfered with unless the trial court erred in principle or omitted some material factor or the sentence is manifestly excessive or inadequate as to comport an error of principle. I find no reason to interfere with the sentences. So I confirm both the conviction and the sentences.

17 Delivered in open court this 14th day of January 2021.


T.R. Ligowe
JUDGE